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COURT OF CRIMINAL APPEALS
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NO. PD-1348-17

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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LAURO EDUARDO RUIZ,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE 186th JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 2015CR4068

POST-SUBMISSION BRIEF FOR THE STATE

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Table of Authorities

Cases

Statutes

NO. PD-1348-17

LAURO EDUARDO RUIZ, APPELLANT	**§**	**IN THE TEXAS COURT**
VS.	**§**	**OF**
THE STATE OF TEXAS, APPELLEE	**§**	**CRIMINAL APPEALS**

POST-SUBMISSION BRIEF FOR THE STATE

To the Honorable Court of Criminal Appeals:

Now comes, Nicholas "Nico" LaHood, Criminal District Attorney of Bexar County, Texas, and files this post-submission brief for the State.

1. **Ruiz's petition for discretionary review should be dismissed as improvidently granted**

The State requests that Ruiz's petition be dismissed as improvidently granted because there is no legal precedent to support his first issue and he has procedurally defaulted on any argument based on his second issue. *See Ritz v. State*, 533 S.W.3d 302 (Tex. Crim. App. 2017) (dismissing Appellant's petition for discretionary review as improvidently granted).

Appellant's brief and his oral argument centered on the position that the school principal should have obtained a warrant before searching Ruiz's cell phone. Ruiz asks this Court to find that a private citizen can violate the Constitution, but provides no legal support for this proposition. It is well settled

law, however, that a private citizen, who is not acting as an agent for law enforcement, cannot violate the Constitutional rights of another citizen. This is not an issue this Court needs to address.

Ruiz plucks one line from this Court's opinion in *Miles v. State* as support for his argument. *See Miles v. State*, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007). This Court may want to address Ruiz's interpretation of *Miles* and clarify the *Miles* holding, but except for one Austin Court of Appeals decision, the lower courts have not misinterpreted the *Miles* opinion and the Fourth Court in this case properly applied the holding in *Miles. See Ruiz v. State*, 535 S.W.3d 593, 593 (Tex. App.—San Antonio 2017 pet. granted). Since there is no evidence that lower courts of appeals are grappling with 38.23 and the "other person" provision after *Miles*, a dismissal of Ruiz's petition as improvidently granted would be appropriate.

2) Ruiz procedurally defaulted on any argument based on a statutory violation

Any other argument Ruiz attempts to bring before this Court has been procedurally defaulted because he did not litigate it at the trial level or in the Fourth Court of Appeals.

While the general approach by courts of review is to uphold a trial court's ruling under any correct theory of law applicable to the case, there are exceptions.

See State v. Esparza, 413 S.W.3d 81 (Tex. Crim. App. 2013) (finding the Callaway rule does not apply "when to do so would work a manifest injustice to the appellant."). At the motion to suppress and on direct appeal, Ruiz failed to argue any statutory basis for a violation that might trigger the exclusionary rule under 38.23(a). Whether there was a statutory violation was not a theory of law litigated at the trial court level; therefore, it cannot be a theory of law applied on appeal. *See State v. Copeland*, 501 S.W.3d 610, 613 (Tex. Crim. App. 2016) (finding that the theory of law applicable to a case should turn on whether the theory was litigated at the trial-court level, not the completeness of the trial court's findings).

In his motion for rehearing to the Fourth Court, Ruiz argued for the first time that the school principal violated Tex. Penal Code Ann. § 33.02, which triggered the exclusionary rule under 38.23(a). Ruiz should not be allowed to now claim that there was a statutory violation because the State and the trial court were not litigating that issue and were not put on notice to decide that issue. It would be unfair to allow Ruiz to scan the entire Penal Code and/or any other code in search of a possible statutory violation that could uphold his position on review when all he argued at the trial level was a constitutional violation. The trial court needs proper notice of the underlying violation allegation because its determination of a constitutional violation versus a statutory violation would turn on different facts and a different legal basis. For instance, determining whether the evidence was

seized under an exception to the warrant requirement would be different from determining whether the evidence was seized by theft.

In addition, the State needs some idea of what type of violation a defendant is alleging. For example, the State in its brief to the Fourth Court and this Court had to attempt to refute several different statutory violations, simply guessing as to what the court of review might potentially try to use to uphold the trial court's decision. Having the parties litigate an issue on appeal that was not addressed at the trial level leaves the parties with an inadequate record and inadequate arguments. This Court addressed such a concern in *Esparza*.

In *Esparza*, the trial court suppressed breath-test results because the State failed to show the circumstances under which they were obtained. 413 S.W.3d at 84. The State appealed and, in response, Esparza argued for the first time that the suppression ruling should be upheld because the State failed to establish the scientific reliability of the results under Rule 702. *Id*. at 85. Reversing the trial court's ruling, this Court carved out an exception to the "*Calloway* rule," which authorizes a court of appeals to affirm a trial court's ruling on an alternative theory not raised in the trial court by the prevailing party. *Id*. at 86-90. It held that reliability under Rule 702 was not a "theory of law applicable to the case" because Esparza never objected on that basis at trial. *Id*. at 86-88. And because Rule 702 turns on the production of "predicate facts" that the State was never fairly called

upon to adduce, the "*Calloway* rule" would result in "a manifest injustice." *Id*. at 89-90.

In the instant case, the State was not fairly called upon to defend against any statutory violation allegations. While it was clear at the motion to suppress that Ruiz was arguing the evidence should be suppressed under 38.23(a) "other person" provision, this general reference to 38.23(a) should not be enough to say that any statutory violation is a theory of law applicable to the case. Parties need some notice of the specific statutory violation allegation in order to develop the record. For example, with Tex. Penal Code Ann. § 33.02, there is a built-in defense to this crime. Under 33.02(e), "it is a defense to prosecution that the person acted with the intent to facilitate a lawful seizure or search of, or lawful access to, a computer, computer network or computer system for legitimate law enforcement purpose." *Id.* § 33.02(e). Without notice at the motion to suppress, the State did not have an opportunity to develop facts or make arguments to the trial court under Tex. Penal Code Ann. § 33.02(e). Which also means the trial court did not have an opportunity to make findings under Section 33.02(e). Since the parties did not litigate a statutory violation and the trial court did not base its decision on a statutory violation, it should not be a theory of law applicable to the case on review. As Presiding Judge Keller stated in the *Esparza* concurring opinion, "[t]he whole point of allowing an interlocutory appeal is to allow a discrete issue to be

litigated early . . . [it] is not designed to resolve all possible bases upon which evidence may be admissible or inadmissible . . .” *Esparza*, 413 S.W.3d at 93.

For the above reasons, the State respectfully requests the Court dismiss Appellant’s petition for discretionary review as improvidently granted.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas requests that Appellant's petition for discretionary review be dismissed as improvidently granted.

Respectfully submitted,

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/s/ Lauren A. Scott

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Lauren A. Scott, herby certify that the total number of words in appellee's brief is approximately 1500. I also certify that a true and correct copy of the above and forgoing brief was electronically delivered to appellant's attorney of record. I also certify that a copy was electronically delivered the State Prosecuting Attorney's office.

/s/ Lauren A. Scott

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Lauren A. Scott
Assistant Criminal District Attorney